Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to	)	
Section 10 of the Communications Act of 1934, as	)	WC Docket No. 05-281
Amended, for Forbearance from Sections 251(c)(3)	)	
and 252(d)(1) in the Anchorage LEC Study Area	)	

OPPOSITION OF MCLEODUSA TELECOMMUNICATIONS SERVICES, INC. MPOWER COMMUNICATIONS CORP.

McLeodUSA Telecommunications Services, Inc. and Mpower Communications Corp. submit this opposition to the above-captioned petition of ACS Anchorage, Inc. ("ACS") requesting forbearance from application in the Anchorage, Alaska study area of obligations to provide unbundled network elements ("UNEs") at cost-based prices pursuant to Sections 251(c) and 252(d) of the Act.

I. COMPETITION IN ANCHORAGE IS INSUFFICIENT TO JUSTIFY FORBEARANCE

The Petition does not justify forbearance. ACS states that GCI, the local cable operator, serves 88,000 out of 182,000 lines in Anchorage. Of these 88,000 lines, 51,000 are provisioned over UNE loops obtained from ACS and 6,000 lines provisioned by resale under Section 251(c)(4).[1] Stated differently, at the present time, GCI remains dependent on UNEs or resale to serve nearly two-thirds of its customers. Because GCI remains dependent on UNEs there is no basis for concluding under Section 10(a) that UNE obligations are unnecessary in Anchorage to assure that prices to consumers are just and reasonable.

[1] Petition at 7.

Although ACS also contends that GCI is "planning" to transfer more customers to its own facilities, even taking ACS's statements at face value, the FCC should not grant forbearance based on allegations of planned activities. To do so would create a minimal standard for obtaining forbearance. There are many factors that could significantly delay or completely alter a carrier's stated plans to build or migrate customers to its own facilities. Unfortunately, this industry is replete with examples of such plans that never came to fruition. Changes in general economic conditions, availability of financing, and customer demand can dramatically and permanently alter carrier deployment plans. Indeed, the mere fact that a competitor could lose access to UNEs may materially affect its ability to obtain financing to invest in its own facilities. Therefore, assuming that some level of facilities-based competition by a cable operator could justify UNE forbearance, it is clearly gross speculation at this point to base any such forbearance on the possibility that at some point in the future more lines may be served by GCI over its own facilities.

In any event, ACS fails to provide any basis for its statement that GCI is able or plans to transfer all of its customers to its own network. Exhibit CGI-6 to GCI's response to questions from the PUC merely shows that GCI is collocated at several ACS wire centers and that it has "deployed fiber facilities that are capable of supplying transport to other carriers ..." GCI Response to Question 22. This says nothing about last-mile loops capable of serving end-user customers. The 2003 testimony of Dana Tindall that GCI's cable telephony plant "will" pass 98% of homes in Anchorage clearly shows that the Commission may not rely on predictions of plant deployment since this prediction has yet to be realized. In any event, this testimony specifically states that GCI will continue to need UNEs in order to serve many business customers.[2]

In the *Omaha Order*, the Commission stated that forbearance could be justified if an intermodal competitor is willing and able to provide service within a commercially reasonable time to a specified percentage of customers served by a wire center.[3] However, there is no basis on the present record concerning when, or if, GCI plans to offer cable telephony to additional customers in Anchorage. Although some analyst presentations indicate that GCI <u>may</u> intend to serve additional customers over its facilities at <u>some</u> point, it is pure speculation to conclude that GCI is willing and able to do so within a commercially reasonable time. Therefore, there is no basis for granting forbearance on the basis of existing or future intermodal competition in Anchorage.

II. THE COMMISSION SHOULD NOT REPEAT THE ERRONEOUS *OMAHA ORDER* FORBEARANCE ANALYSIS

Apart from the fact that there is insufficient non-UNE competition in Anchorage to justify forbearance, the Commission must deny the Petition because it would require the Commission to reapply certain erroneous aspects of the forbearance analysis of the *Omaha Order*. Commenters briefly discuss some of those most egregious errors below.

<u>"Fully Implemented" Means More Than Establishment of Rules</u>. In order to grant the GCI Petition, the Commission must find under Section 10(d) that the requirements of Section 251(c)(3) have been "fully implemented." In the *Omaha, Order*, the Commission found that "fully implemented" means that the Commission has issued rules "implementing" Section 251(c)

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[2] Prefiled Rebuttal Testimony of Dana Tindall, U-96-89, September 29, 2003, p. 5.

[3] *Omaha Order*, n. 156.

and those rules have gone into effect.[4] Since Section 251(d)(1) required the Commission to adopt unbundling rules within six months of enactment of the 1996 Act, the Commission's interpretation is that Congress forbade the FCC from forbearing only for the six-month period prior to the adoption of unbundling rules in August 1996. This interpretation is nonsensical on its face because it would have permitted the Commission to: abolish unbundling requirements even before the rules had been implemented through any interconnection agreements, had any operational effect, and before any degree of competition had been achieved; eliminate unbundling requirements virtually at the same moment the rules become effective and before ILECs were ever required to comply with the rules; and also to forebear even if its unbundling rules were subsequently stayed or vacated. This interpretation also contradicts the Commission's earlier view of what was required to implement Section 251. In the *Local Competition Order* the Commission described its adoption of rules as merely "the initial measures that will enable the states and the Commission to begin to implement sections 251 and 252." (emphasis added).[5]

More importantly, this interpretation is unlawful because it effectively writes intramodal competition out of the Act. Under the Commission's interpretation, it may eliminate unbundling obligations even where there is impairment and even before the development of facilities-based competition. This conflicts with the legislative history of the 1996 Act and the Commission's own statements that the Act was intended to promote intramodal UNE-based competition.[6] The Commission ignored all this, however. Nowhere in the *Omaha Order* did the Commission

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[4] *Id.* para. 53.

[5] *Local Competition Order*, para. 6, 307.

[6] *Id.* para. 12.

consider or evaluate the benefits of intramodal competition or balance these against other goals of the Act. Instead, the Commission adopted the ILEC refrain that unbundling is burdensome. The Commission's superficial analysis of the costs and benefits of unbundling was independently arbitrary and unlawful because the Commission ignored the fact that the Commission's pricing rules allow ILECs to recoup their forward looking costs of unbundling and earn a reasonable profit in provision of UNEs and at the same time to keep traffic on their networks.[7] To the extent the Commission gives credence to the BOCs' claims that TELRIC pricing needs reform, the remedy in not to eliminate the unbundling requirement but to fix the alleged pricing problem. . Of course, the Supreme Court's affirmation of the TELRIC pricing rule belies the RBOC arguments in favor of changing that rule.

Moreover, the Commission's belief expressed in the *Omaha Order* that its interpretation of "fully implemented" in Section 10(d) is most consistent with Section 251(d)(1)'s requirement that the Commission establish unbundling regulations "to implement" the requirements of Section 251 is wrong. Assuming, as the Commission states in the *Omaha Order*, that "implemented" in Section 251(d)(1) refers to adoption of rules, then Congress' use of "fully implemented" in Section 10(d) must mean more than merely the adoption of rules. The Commission must give meaning to every word in a statute, if possible, and may not read a word or term out of existence.[9] Thus, the language of Section 10(d) is not a statement, nor does it imply, that Congress meant to limit forbearance only prior to the adoption of unbundling rules even if in some sense Congress meant in Section 251(d)(1) that establishment of rules would

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[7] *Omaha Order* at 40.

[9] *United States v. Menasche*, 348 U.S. 528 (1955).

begin to "implement" unbundling requirements. Rather, the difference in language between Sections 251(d)(2) and 10(d) suggests that Congress intended Section 10(d) to refer to more than the mere establishment of rules potentially referred to in Section 251(d)(2). The Commission's reference to "to implement" in Section 251(d)(1) undermines, rather than supports, its view of "fully implemented" in Section 10(d).

The Commission's interpretation of "fully implemented" is also erroneous because it does not give a reasonable meaning to "fully." Section 10(d) says that the Commission may not forbear until unbundling requirements are "fully" implemented. "Fully" would have no meaning if it meant only the establishment of rules because there are no degrees of establishment of rules. Rules are either adopted and in effect or they are not. The Commission in the *Omaha Order* did not explain what meaning "fully" could have as applied to the establishment of rules.

Instead, "fully implemented" refers not to the establishment of rules but to some objective level of competition in the marketplace that eliminates or substantially reduces CLEC impairment. This approach to the meaning of "fully implemented" would harmonize Section 10(d) with the impairment standards of Section 251(d)(2). The Commission is required to interpret the Act if possible in ways that harmonize and give meaning to every section.[10] The Commission's interpretation is unlawful because it uses "fully implemented" to negate the impairment standards of the Act. Significantly, even ILECs believe that "fully implemented" refers to a sufficient level of competition in the marketplace, not just the adoption of rules.[11]

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[10] *In re Public Bank of New York*, 278 U.S. 555 (1928)

[11] Petition at 45; Qwest Omaha Petition at 31.

The D.C. Circuit also believed that Section 251(c) had not been "fully implemented" as of 2001, which precludes the Commission's interpretation, in spite of its rationalization.[12]

In any event, unbundling obligations have not been fully implemented in Anchorage because the competition that GCI relies on is primarily the result of access to the very UNEs that GCI seeks to eliminate . Accordingly, the Commission may not forbear based on the narrow view of "fully implemented" set forth in the *Omaha Order* and may not otherwise forbear because UNE-based competition will not support a finding that the Anchorage market is competitive. The "fully implemented" standard of Section 10(d) precludes grant of the Petition.

<u>There is No Basis for A "Predictive Judgment" that GCI Will Offer UNEs at Competitive Prices</u>. The Petition states that GCI intends to continue to offer UNEs on a commercial basis even if it is not required to offer UNEs at TELRIC prices.[13] In the *Omaha Order*, the Commission found that "the record does not reflect any significant alternative sources [other than Qwest] of wholesale inputs for carriers" in Omaha.[14] Paradoxically, however, the Commission then went on to make a "predictive judgment" that Qwest will make its network available "at competitive rates and terms."[15] This was a serious error that invalidates the *Omaha Order*. In the absence of a competitive market there is no basis to assume that Qwest will makes its network available at competitive prices, even if it is correct that Qwest has incentives to keep traffic on its network. In fact, the Commission unlawfully ignored the unrefuted evidence submitted by McLeodUSA that Qwest has never made an offer of

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[12] *Association of Communications Enterprises v. FCC*, 235 F. 3d 662, 666 (D.C. Cir. 2001); *Omaha Order*, n. 133.

[13] Petition at 3.

[14] *Omaha Order*, para. 67.

[15] *Omaha Order*, para. 84.

"commercial pricing" other than special access pricing.[16] In numerous proceedings, the Commission has recognized that dominant carriers have incentives to engage in price and other forms of discrimination in order to harm competitors.[17] And, the Commission has not found either Qwest or ACS nondominant in provision of wholesale services or even for provision of enterprise retail services.[18] Nor would it be possible for the Commission do so in light of the findings in the *Triennial Review Remand Order* that CLECs have few alternatives to ILEC loops and transport except in a few wire centers.

Rather than having incentives to set prices at competitive levels, Qwest's and ACS' pricing decisions will take advantage of the fact that each is the only wholesale loop provider in Omaha and Anchorage, respectively. As previously observed by the Commission, "Congress recognized that, because of the incumbent LEC's incentives and superior bargaining power, its negotiations with new entrants over the terms of such [interconnection] agreements would be quite different from typical commercial negotiations."[19] Qwest and ACS pricing decisions will seek either to maximize profits while stopping short, in some cases, of driving the intramodal competitor out of business, or in other cases, to drive the intramodal competitor out of business if Qwest and ACS believe that they can win back the retail customer. In other cases, ILECs may enter into some commercial agreements merely to forestall regulatory oversight or to meet regulators' expectations. These prices will not be prices that would prevail in a competitive market.

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[16] Letter to Marlene H. Dortch from William A. Haas, Associate General Counsel, McleodUSA, September 14, 2005, at 2-3.

[17] *See e.g, Local Competition Order* para. 307 ("We are also cognizant of the fact that incumbent LCs have the incentive and ability to engage in many kinds of discrimination.").

[18] *Omaha Order* para. 50.

[19] *Local Competition Order* para. 15.

Nor is it an answer that wholesale prices are subject to the Section 201 "just and reasonable" standard. In light of the ongoing and uncompleted *Special Access Reform* proceeding, there is no reason to believe that special access prices are just and reasonable. And, by definition, prices that are "commercially negotiated" when one party has the upper hand because it is the monopoly wholesale provider are not just and reasonable even if the wholesale customer finally is forced to accept them. Rather, as noted, these prices will be set to take advantage of the absence, rather than the abundance, of competition for wholesale inputs, and will exceed cost, as are most special access prices subject to pricing flexibility. In this connection, the Commission is already considering at least one complaint concerning prices set by ILECs for Section 271 UNEs, and likely will be receiving more. Of course, prices for wholesale services will not be subject to Section 201 to the extent the Commission reclassifies any such services as subject only to Title I.

The Commission should not commit the same error here as in the *Omaha Order* and base its public interest evaluation on a highly improbable "predictive judgment" that GCI will offer UNEs at competitive prices.

III. THE *OMAHA ORDER* REQUIRES WIRE CENTER FORBEARANCE

GCI's Petition requests forbearance in the Anchorage, Alaska study area. Although the forbearance analysis of the *Omaha Order* was in most respects erroneous, that decision appropriately rejected Qwest's request for forbearance throughout Omaha and limited forbearance to specific wire centers. Assuming any forbearance were justified here, which it is not, the Commission should, at a minimum, focus its forbearance analysis on specific wire centers.

However, there is no information on the record that would justify forbearance in any wire center in Anchorage even under the standards established in the *Omaha Order*. GCI has submitted only aggregate data, which because it shows only that GCI provides service for the most part using UNEs, is insufficient to warrant forbearance either on an MSA or wire center basis.

Accordingly, even if the Petition were otherwise meritorious, it could not be granted because GCI has not submitted wire center level information.

IV. CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

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January 9, 2006